

Office of the Attorney General of Alabama

Open Records Law: A Primer

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Federal Law

- The federal Freedom of Information Act does not apply to state agencies. *Ferguson v. Ala. Criminal Justice Info. Ctr.*, 962 F.Supp. 1446 (M.D. Ala. 1997).



Federal Law Exception

- Grants of federal funds
- Day-to-day supervision
 - *Lakewood Residents Ass’n, Inc. v. Township of Lakewood*, 682 A.2d 1232 (N.J. Super. Ct. App. Div. 1994).
 - *Forsham v. Harris*, 445 U.S. 169 (1980).



Alabama Code Provisions

- §36-12-40
- “Every ***citizen*** has a right to inspect and take a copy of any ***public writing*** of this state, except as otherwise expressly provided by statute.”



Out-of-State Citizens

- AG No. 2001-107 – Public records must be released to out-of-state citizens and businesses.
- *McBurney v. Young*, 133 S.Ct. 1709 (2013) – Relying, in part, on §36-12-40, in reading VA law as applying to VA citizens only.
- **AG Form Response:** An out-of-state citizen or entity does not have standing to inspect our public records under the Open Records Law. *McBurney v. Young*, 133 S.Ct. 1709 (2013).



Request Form

- *Blankenship v. City of Hoover*, 590 So.2d 245 (Ala. 1991) – agency may insure inspection for legitimate or proper purpose.
 - *Name*
 - *Date*
 - *List or description of documents*
 - *Reason for inspection*
- *Holcombe v. State*, 249 Ala. 590, 200 So. 739 (1941) – purely speculative or idle curiosity not legitimate reason.



Alabama Code Provisions

- §36-12-40
- No specific timeframe to respond
- AG No. 2008-073
 - Provide documents within reasonable period of time from when request made, which time to be determined by the custodian of records.
 - Custodian may not cause any unreasonable delays.



Alabama Code Provisions

- §36-12-40
- Recommended response time
 - 30 days commonly accepted
 - Form letter acknowledging receipt and review is advised
 - Status letter after 30 days is advised
- No specific form of response
 - Statement of reasons for withheld documents or excised portions not required



Electronic Records

- AG No. 2007-001 – State Banking Department database of licensee information public.
- AG No. 98-00157 – Alabama Development Office information on businesses on computer disc is public.
- AG No. 95-00266 – State Treasurer financial information stored electronically on computer public.
- AG No. 88-00047 – county tax assessor computer records on real property data public.



Alabama Code Provisions

- § 41-13-1
- [T]he term “**public records**” shall include all **written, typed or printed** books, papers, letters, documents, and maps **made or received in pursuance of law** by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business and shall also include any record authorized by law or pertaining to any court of record or any other public record authorized by law or any paper, pleading, exhibit or other writing filed with, in or by any such court, office or officer.



Alabama Code Provisions

- § 41-13-1
- Caselaw definition of “public writing”
- *Stone v. Consolidated Pub. Co.*, 404 So.2d 678, 681 (Ala. 1981) – “such a record as is reasonably necessary to record the business and activities ***required to be done or carried on*** by a public officer so that the status and condition of such business and activities can be known by our citizens.”
- Documents used in furtherance of an officer’s or agencies duties
 - AG No. 2006-134 – fire reports
 - AG No. 2000-52 – meeting documents/agendas



Public Writing

- *Stone* definition
 - Does this document record business and activities that are ***required to be done or carried on*** by a public officer? AND
 - Does the ***public reasonably need to see*** this document to know about those business and activities?
- Question of fact
 - Unrelated to official business
 - Document easily available from another source
 - Potential to confuse the public



Public Writing

- *Blankenship v. City of Hoover*, 590 So.2d 245 (Ala. 1991) – the Open Records Law should be liberally construed in favor of the public.
- AG No. 99-00258 – It is the longstanding position of the Attorney General's Office to favor the disclosure of information and records.



Preliminary Documents

- AG No. 96-00003 – names of persons recommended by the superintendent of education for transfer or disciplinary action are part of the superintendent's thought processes and not subject to disclosure until acted on by the board of education.
- AG No. 96-00126 – individual documents reflecting the opinions of each individual board of education member, which are used to compile the board's evaluation of its superintendent, are not subject to disclosure.
- It is ***only the final draft or document, reflecting the ultimate decision***, which is contemplated by the Open Records Law.



Preliminary Documents

- AG No. 2007-031 – the final document generated in response to the taking of notes, if any, is a public record, the notes themselves are not public records.
- AG No. 2010-050 – The Secretary of State's written order in a complaint file removing a registrar is subject to disclosure under the Open Records Law. The open complaint file, closed complaint file when no cause is found to proceed with removal, and ***internal recommendations as to how to proceed, but not constituting the final order***, may be withheld from public inspection.



Preliminary Documents

- AG No. 2014-087 – A sublist of the statewide voter registration list that is created by the Secretary of State, which has been modified by the Department of Public Safety, should not be considered a public record or writing that is subject to disclosure.
- The list was incomplete, with discrepancies, to be used in preliminary stages of planning.



Preliminary Documents

- AG No. 2017-036 – Draft documents, such as versions of proposed administrative rules and legislation, used internally by the Department of Revenue, are not subject to disclosure under the Open Records Law.
- Drafts shared externally, as well as internal and external correspondence, such as emails, on possible actions to be taken by Revenue, are also not subject to disclosure.



Caselaw Exceptions

- *Stone v. Consolidated Pub. Co.*, 404 So.2d 678, 681 (Ala. 1981)
- “Rule of reason” test: “Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference.”
 - Recorded information received by a public officer in confidence
 - Sensitive personnel records
 - Pending criminal investigations
 - Records the disclosure of which would be detrimental to the best interests of the public



Caselaw Exceptions

- *Blankenship v. City of Hoover*, 590 So.2d 245 (Ala. 1991) – public has no right to records that are more personal than public.
- Presumption
- *Chambers v. Birmingham News Co.*, 552 So.2d 854 (Ala. 1989) – “There is a presumption in favor of public disclosure of public writings and records expressed in the language of §36-12-40.
- *Allen v. Barksdale*, 32 So.3d 1264 (Ala. 2010) – “The party refusing disclosure shall have the burden of proving that the writings or records sought are within an exception and warrant nondisclosure of them.”



Caselaw Exceptions

- Detrimental to public's best interest
- *Hogan Lovells US LLP v. Jefferson Dunn*, CV-2016-774 (Cir.Ct. Montgomery Co.)
- *Reverend Tabitha Isner v. Jefferson Dunn*, CV-2017-240 (Cir.Ct. Montgomery Co.)
 - Documents showing manufacturers of drugs used by Department of Corrections to administer lethal injection



Redactions

- More personal than public
- AG No. 2015-057
 - Home address
 - Home telephone number
 - SSN
 - Driver's license number
 - Occupation
 - Employer
 - Business address
 - Business telephone number
 - Juvenile information



Redactions

- AG No. 2006-134
 - Marital status (more personal than public)
 - Medical history (sensitive personnel records)
- More personal than public
- Detrimental to public's best interest
- AG No. 2013-046
 - Private email addresses of citizens in town database



Redactions

- Detrimental to public's best interest
- AG No. 2016-049
 - Checking account numbers on checks drawn on checking account for the district attorney's office
- Pending criminal investigations
- AG No. 2015-057, No. 2006-134
 - Need not release any portion of document ordinarily public that would compromise an investigation



Statutory Redactions

- § 41-13-7
- Agency shall redact ***identifying information*** on employee from public records, unless express consent obtained
- Employee
 - State employee subject to State Merit System
 - Employees of the criminal justice sector at any level of government, including the district attorney's office
- Identifying information general rule
 - Any information, other than a person's name, used alone or with other info, to identify a person or person's property



Statutory Redactions

- § 41-13-7
- Non-exhaustive list
 - **DOB**
 - SSN
 - Driver's license number
 - Financial services account numbers, including checking and savings accounts
 - Credit or debit card numbers
 - Personal identification numbers (PIN)
 - Electronic identification codes
 - Automated or electronic signatures
 - Biometric data



Statutory Redactions

- § 41-13-7
- Non-exhaustive list
 - Fingerprints
 - Passwords
 - Parents' legal surname prior to marriage
 - Name or names of any dependent child or children
 - Home address or phone number
 - Any other numbers or info that can be used to access a person's financial resources, obtain or act as identification, or obtain goods or services



Statutory Redactions

- § 41-13-7
- Exceptions
 - Disclosure to federal or state agency for legitimate governmental purpose
 - Pursuant to federal or state law
 - Pursuant to federally funded program
 - Pursuant to administrative or judicial subpoena/order
 - ***“Bona fide news organization”***
 - § 6-8-60
 - (1) printed in English, (2) general circulation in the county, (3) principal editorial office in the county, (4) hold publication class mailing permit for 51 weeks a year



Format of the Records

- AG No. 2014-082 – board of registrars is not required to provide a citizen with a list of voters who have been disqualified because of convictions for unlawful possession of marijuana in the first degree when such records are not maintained by the board.
- Open Records Law requires a governmental agency to provide reasonable access to public records ***as those records exist.***



Format of the Records

- Computer files
- AG No. 88-00079 – Department of Postsecondary Education did not have to compile information from personnel system or transfer it to disc for *Birmingham News*.
- Postsecondary had to provide reasonable access to the information and provide it in some reasonable form where the *News* could read and understand it and assimilate the information on their own.



Format of the Records

- Computer files
- AG No. 2007-001 – a state agency is not required to distribute public records in the manner that a requestor specifies.
- State Banking Department could furnish paper files containing licensee data also in its database without exporting the information from the database into a text file.



Format of the Records

- Computer files
- AG No. 90-00105 – Department of Public Safety did not have to sort driver's license information and provide it on computer disc.
- It is not the Department's responsibility or duty to provide the information in a particular form nor must the information be compiled or assimilated for the public.



Format of the Records

- Paper files from another source
- AG No. 91-00288 – no statutory mandate for the Department of Insurance to provide computer printout lists of names and addresses of all licensed insurance agents when a list of those same agents' names is already compiled and printed in a directory on an annual basis for the public.
- Department was statutorily required to publish and sell the directory.



Providing the Records

- AG No. 2008-073 – custodian of records must make the records available for copy and inspection during *normal business hours*.
- Custodian has the authority to regulate the manner in which records are inspected and to set *reasonable limitations* upon access to records to preserve the integrity of the records, minimize the expenses, and prohibit work disruption.



Providing the Records

- Reasonable limitations on public access
- AG No. 92-00154
 - Number of persons who may review records
 - Number of records to be reviewed at one time
 - Time of day that records may be reviewed
 - Days in which records may be reviewed
 - Portable copier may not be prohibited unless damages records or interferes with operation of office.



Providing the Records

- Reasonable limitations on public access
- AG No. 2009-076 – the probate judge does not have the authority to refuse the use of personal cameras or other electronic devices for receiving copies or retrieving information from public records unless the camera or other electronic device unduly interferes with the operation of the office of the probate judge.
- Photographs are harmless.
- Fact that more modern methods of copying are devised should not lessen right given to public to inspect and take a copy of public records.



Mailing Copies

- General rule
 - *Person v. Alabama Department of Forensic Sciences*, 721 So.2d 203 (Ala.Civ.App. 1998) – a public entity has no legal duty to mail a copy to a person making a request.
 - *Ex parte Gill*, 841 So.2d 1231 (Ala. 2002) – “§ 36-12-40 does not entitle inmates to any relief from their incarceration or to any transportation to the custodian’s office.”
- Exception for inmates?
 - *Ex parte Perch*, 17 So.3d 649 (Ala. 2009) – circuit clerk required to send easily identifiable records to inmate for which payment received in advance.



Costs

- § 36-12-41
- “Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a ***certified copy*** of it, ***on payment of the legal fees therefor***, and such copy is admissible as evidence in like cases and with like effect as the original writing.”



Costs

- General rule
- AG No. 98-00161 – a public entity may recoup reasonable costs incurred in providing public documents.
 - Ordinarily, free access
 - May only charge due to budgetary constraints
 - Actual cost of copying or retrieving information
 - Staff research, preparation, and time
 - Not an attorney's time in determining confidentiality



Costs

- Cost of copying
- AG No. 2013-040 – use, wear, and tear of a computer terminal; printer time; other related expenses.
- No charges
- AG No. 2009-076 – personal cameras or other electronic devices
- AG No. 92-00154 – personal, portable copier



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